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No. 02-1710

IN THE
Supreme Court of the United States

CITY OF CHICAGO,

Petitioner,

v.

MARK G. WEINBERG,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that a ban on the sale of a book out of a knapsack on the public sidewalks within 1,000 feet of a Chicago sports arena is an invalid time, place, and manner regulation of speech in a public forum.

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RESPONDENT'S BRIEF IN OPPOSITION

A Chicago ordinance prohibits peddling on any portion of the public way within 1,000 feet of the United Center, home to the Chicago Blackhawks and the Chicago Bulls, while allowing other expressive activities to take place within those same boundaries, such as newspaper sales, leafleting, charitable solicitation, and street performances. A panel of the Court of Appeals for the Seventh Circuit held unanimously that the ordinance was an invalid time, place, and manner restriction as applied to the sale of a book out of a knapsack by a lone bookseller, respondent Mark Weinberg. The book, written and published by Mr. Weinberg, entitled *Career Misconduct: The Story of Bill Wirtz's Greed, Corruption and Betrayal of Blackhawks Fans* ("*Career Misconduct*"), is a highly critical portrait of the political and business dealings of prominent Chicago businessman Bill Wirtz, owner of the Blackhawks and part-owner of the United Center.[1]

The City of Chicago seeks review of that ruling, alleging that the Seventh Circuit's decision conflicts with this Court's precedents and the decisions of other courts of appeals upholding various peddling restrictions in other cities. Chicago contends that the panel's holding sets the evidentiary bar too high, making it impossible for municipalities to defend targeted peddling restrictions and stripping local governments of an invaluable tool in maintaining public order at crowded venues.

There is no merit to any of these concerns and no basis for this Court to grant review. This case presents no important legal question to resolve. It is undisputed that the court of appeals stated the correct legal standard—whether the city ordinance was a valid time, place, and manner restriction. *See*

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[1] The book is an exposé of various business and political dealings of Bill Wirtz that details, among other things, instances of Mr. Wirtz's alleged violations of federal antitrust and securities laws, and his alleged bribery of public officials, exploitation of Illinois's no-limit campaign-contribution laws, and collusive actions taken against the NHL Players Association.

Cert. Pet. i. The only question presented by the petition is the correctness of the court of appeals' application of that legal standard to a particular set of facts, based on the record before it. Moreover, the Seventh Circuit's conclusion that this ordinance is not narrowly tailored, bans significantly more speech than necessary, and fails to leave open ample alternative channels of communication is readily supported by this Court's jurisprudence governing the validity of regulations of speech on public sidewalks, the prototypical public forum.

Nor does the court of appeals' holding, which has not yet been reduced to an injunction against the city, create a split in the circuits. There is no single answer to the question whether a particular regulation of peddling violates the First Amendment. The answer in any given case depends largely on the evidence adduced to support the local government's interests, the tailoring and breadth of the restriction, and the availability of adequate alternative means of communication. It is no surprise, then, that some lower court decisions sustain these types of regulations, while others strike them down. This diversity of outcomes (including variations within the same circuit) is not indicative of a conflict in the circuits that requires resolution by this Court, but merely underscores that application of the time-place-and-manner test is inherently fact-bound. For these same reasons, there is no basis to conclude that the panel's ruling will deny local governments the power to address legitimate problems of pedestrian congestion and security on the public streets and sidewalks. Far from "unduly limit[ing] the police power and throw[ing] previously settled law into disarray," Cert. Pet. 8, the panel simply held that, on this record, Chicago did not justify its sweeping ban on the sale of books within 1,000 feet of the United Center.

STATEMENT

From 1991 to 1997, Mark Weinberg published and sold a hockey program, *The Blue Line,* from the public sidewalks in front of the United Center and its forerunner, the Chicago Stadium, without incident. 310 F.3d 1029, 1033 (7th Cir. 2002); Weinberg Decl. ¶ 4 (R. 43, Exh. H).[2] Beginning in December 2000, Mr. Weinberg began to sell his 156-page soft-cover book, *Career Misconduct,* for $13.00 per copy. For two months, Mr. Weinberg sold his book on the public sidewalks outside the United Center without interference from city authorities. No complaints were made about Mr. Weinberg by United Center patrons, Lamb Depo. 117-18 (R. 43, Exh. G), and no complaints had ever been made about booksellers on Chicago public sidewalks generally. Reyes Depo. 58-60 (R. 43, Exh. F). In fact, the city concedes that Mr. Weinberg is the *only* person known ever to have sold a book outside the United Center. Defendant's Responses to Plaintiff's Third Set of Interrogatories, Answer to No. 2 (R. 43, Exh. D); *see also* 310 F.3d at 1039.

At some point after Mr. Weinberg began selling his book, the head of United Center security called the police to complain about his presence, and a special meeting was held at the United Center among United Center security, police officers, and the Chicago Corporation Counsel's Office to discuss what action could be taken against Mr. Weinberg. Lamb Depo. 50-51, 65, 71-73 (R. 43, Exh. G); Dougherty

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[2] The city treated this hockey program as a "newspaper." Newspapers are exempt from the ordinance's peddling restrictions. *See* Chicago Muni. Code § 10-8-520. A different hockey program, *The Crease,* along with a weekly newspaper, *Streetwise,* and various daily newspapers, such as *The Chicago Tribune,* were sold outside the United Center at the time of Mr. Weinberg's motion for summary judgment. Weinberg Decl. ¶¶ 4-5 (R. 43, Exh. H); Buckley Decl. ¶¶ 1-3, 5 (R. 43, Exh. I).

Depo. 12-14, 22-27 (R. 51, Exh. 18). Thereafter, on February 14, 2001, Chicago police officers informed Mr. Weinberg that he must stop selling his book outside the United Center because he was in violation of the city ordinance banning peddling in the vicinity of the stadium. The city had never before enforced a peddling ordinance against a person selling books out of a bag, without a newsstand, on the public sidewalks. Reyes Depo. 58-60 (R. 43, Exh. F). Threatened with arrest, Mr. Weinberg stopped selling his book outside the United Center. 310 F.3d at 1034.

The ordinance, Chicago Muni. Code § 4-244-147, imposes a flat ban on the peddling of merchandise, including books, within 1,000 feet of the United Center, a restriction that applies 24 hours a day, 365 days a year, and covers several city blocks in each direction of the stadium. It is undisputed that a majority of United Center patrons either park in the several parking lots within the 1,000-foot boundary or are dropped off by buses or taxis directly in front of the United Center. Patrons accordingly have to walk *away* from the United Center to find a vendor selling books more than 1,000 feet from the arena. 310 F.3d at 1040; 179 F. Supp. 2d 869, 878 (N.D. Ill. 2002); Walls Depo. 22-24 (R. 51, Exh. 1). On the few occasions that Mr. Weinberg used assistants to help sell his book, those assistants posted at intersections a block from the stadium (near the Damen Ave. and Wood St. intersections with Madison Ave.)—still within the 1,000-foot perimeter—never sold more than three books per game, Weinberg Decl. ¶ 1 (R. 43, Exh. H), in contrast to the 20-45 books Mr. Weinberg was able to sell during many games when he stood closer to the stadium. (R. 51, Exh. 19).

After he was threatened with arrest, Mr. Weinberg sought and obtained a temporary restraining order permitting him to resume sales at the arena. After extensive discovery by both sides, Mr. Weinberg moved for summary judgment. The district court granted judgment to the city, holding that the

ordinance did not violate Mr. Weinberg's First Amendment rights. A panel of the Seventh Circuit reversed, concluding that the ordinance was not a valid time, place, and manner restriction as applied to Mr. Weinberg's sale of his book. The court remanded the case for entry of an appropriate injunction. As explained below, there is no basis for further review.

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH AND SUPPORTED BY THIS COURT'S PRECEDENTS REGARDING THE APPLICATION OF THE TIME-PLACE-AND-MANNER TEST.

"[S]peech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum." *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 377 (1997). "In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" *United States v. Grace*, 461 U.S. 171, 177 (1983) (citations omitted); *see also Carey v. Brown*, 447 U.S. 455, 460 (1980) (access to streets, sidewalks, parks and other similar public places "cannot constitutionally be denied broadly and absolutely") (citations omitted).

Accordingly, because the Chicago ordinance prohibits Mr. Weinberg from selling his book on the public sidewalks in the vicinity of the United Center, the court of appeals properly required the city to establish that § 4-244-147 is a valid time, place, and manner regulation. The court held that Chicago failed to satisfy that test because the 1,000-foot ban is not narrowly tailored to serve the city's interests in preventing congestion and ensuring security, is riddled with exceptions

that undermine the credibility of the city's claimed interests, eliminates far more speech than is necessary to serve the city's goals, and fails to preserve adequate alternative channels of communication. 310 F.3d at 1036-42. Each aspect of this ruling is consistent with this Court's precedents.

A. First, the court held that the ordinance is not narrowly tailored. 310 F.3d at 1038-40. The court acknowledged that Chicago has a legitimate interest in addressing congestion and ensuring security, but found the evidence insufficient to establish that the 1,000-foot ban is actually tailored to serve that interest. The evidence presented by the city to support such a sweeping ban was "scant," consisting of conclusory statements by a few police officers that, before the ordinance was adopted in 1995, not long after the opening of the United Center, the peddling of general merchandise created congestion, and the promulgation of the ordinance essentially eliminated the problem. *Id.* at 1038. There was no evidence that anyone other than Mr. Weinberg had ever attempted to sell books outside the United Center, much less that, collectively, booksellers had contributed to congestion at the United Center. The city also presented no persuasive evidence that Mark Weinberg had interfered with pedestrian traffic while selling his book. *Id.* at 1039.[3]

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[3] In his opinion dissenting from the denial of rehearing en banc, Judge Easterbrook, quoting the district court opinion, referred to testimony from a police officer that Mr. Weinberg gathered crowds around him of six to eight people, presenting an obstacle to the smooth flow of pedestrian traffic. *See* 320 F.3d 682, 684 n.2 (7th Cir. 2003). This is a misstatement of the record. Officer Walls was referring only to the group of people that had gathered around Mr. Weinberg when he was being interviewed by the press on February 21, 2001. That same evening, a court-ordered videotape was being made of Mr. Weinberg selling his book before the start of a Blackhawks game. The officer stated explicitly that he did not see that crowd around Mr. Weinberg when he was selling his book, *see*

Ultimately, the court of appeals found the videotape ordered by the district court of Mr. Weinberg selling his book before the start of a Blackhawks game to be significantly more probative regarding the city's need for a 1,000-foot ban on peddling books than the few statements offered by the city to substantiate its claim that the ordinance was necessary to alleviate congestion. As the court recognized, the video showed no interference with pedestrian traffic and no congestion along the ample 22-foot-wide sidewalk in front of the United Center, let alone on the sidewalks a few hundred feet away. *Id.*[4] The city's only evidence in support of the prohibition "was based on speculation as to what might happen if booksellers could sell their books and the cumulative effect this might have on pedestrian traffic." *Id.* at 1039.[5]

Walls Depo. 42-46 (R. 51, Exh. 1), although he did testify that he believed that the sale of books was disruptive. *Id.* at 37-40.

[4] The city insinuates that Mr. Weinberg's nondisruptive conduct during the videotaping was not typical of the manner in which he usually sold his books. Cert. Pet. 12 n.3. The city presented no evidence, however, that either Mr. Weinberg's behavior or the flow of pedestrian traffic outside the stadium depicted on the tape were not representative, leading the court of appeals to comment that the city "fail[ed] to make a persuasive assessment of the tape or its worth." 310 F.3d at 1038.

[5] The city's amici argue that the Seventh Circuit shortchanged Chicago's interests in ensuring the safety and security of sports-arena patrons in the wake of the events of September 11, 2001. *See* Amici Brief of Major League Baseball et al. Despite the fact that both the district court's and court of appeals' rulings in this case were issued after September 11, 2001, the city did not advance this argument below; thus, the record is silent as to whether the ordinance is narrowly tailored to advance this new claimed interest. The only safety justifications for the ordinance advanced by Chicago in the courts below was that peddling could disrupt "traffic flow" and

Far from imposing a new evidentiary burden on local governments, the Seventh Circuit stood on solid ground in demanding something more than a bald invocation of a city's interests in promoting safety and preventing congestion. *Id.* at 1038. This Court has "never accepted mere conjecture as adequate to carry a First Amendment burden," *Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton,* 536 U.S. 150, 170 (2002) (Breyer, J., concurring) (quoting *Nixon v. Shrink Missouri Gov't PAC,* 528 U.S. 377, 392 (2000)); *accord Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n,* 512 U.S. 622, 664 (1994), but has always looked behind the interests claimed to assess whether a restriction on speech is truly necessary. *See, e.g., Watchtower,* 536 U.S. at 168 (rejecting claim that ordinance requiring permits for door-to-door canvassers was justified by village's interest in crime prevention, where there was no evidence of a crime problem related to such canvassing); *Grace,* 461 U.S. at 182 (striking down statute prohibiting signs and leafleting on the public sidewalks in front of the Supreme Court as unnecessary despite legitimacy of government's interest in maintaining order).

Chicago cannot bootstrap the absence of concrete evidence that the sale of books near the United Center created a congestion problem by aggregating the effects of the presence of nonexistent booksellers who might appear in the wake of the court's decision, although they have never done so before. Cert. Pet. 8-11, 15. Despite the city's assertions, this Court's decision in *Heffron v. International Soc'y for Krishna*

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create "congestion," *see, e.g.,* Petition for Rehearing En Banc at 4-9 (7th Cir.); Brief of Defendant-Appellee at 12, 32-36 (7th Cir.). The city's strongest evidence in support of its purported safety rationale was that pedestrians could potentially have to walk around Mr. Weinberg—not that he or other peddlers would interfere with the ability of law enforcement to prevent acts of terrorism.

Consciousness, Inc., 452 U.S. 640 (1981), is not to the contrary. There, in upholding a state rule limiting the sale and distribution of written materials to designated areas within the state's fairgrounds, the Court explained that any exemption from the rule could not be meaningfully limited to ISKCON, but would apply to "similarly situated groups." *Id.* at 654. The Seventh Circuit's analysis here focuses on the effect of permitting Mr. Weinberg to sell his book because there are no, and have never been any, other booksellers around the United Center to consider. 310 F.3d at 1039.

Nor is there reason to assume, on this record, that peddlers of other types of merchandise are so "similarly situated" to Mr. Weinberg as to render the ordinance invalid as to all other vendors. Peddlers who, unlike Mr. Weinberg, might seek to erect stands, racks, and tables to hawk their wares, present different issues. *See, e.g., International Caucus of Labor Comms. v. City of Montgomery,* 111 F.3d 1548 (11th Cir. 1997) (per curiam); *Graff v. City of Chicago,* 9 F.3d 1309 (7th Cir. 1993) (en banc). Even with respect to peddlers selling other types of expressive merchandise out of a bag, the city would have an opportunity to make a record justifying continued enforcement of the ordinance against them. *See Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 501 n.8 (1981) (plurality opinion) (recognizing the "uniqueness of each medium of expression"); *see also* Part II, *infra*.

Thus, the ramifications of the Seventh Circuit's opinion, as claimed by the city, are entirely speculative and the alarm the city sounds seriously exaggerated. The district court has not yet crafted an injunction in this case. On remand, there is little doubt that Chicago will argue that the Seventh Circuit's opinion should be narrowly construed so as to require an injunction that would prevent enforcement of the ordinance only as against Mr. Weinberg, or, perhaps, against booksellers generally. There is no reason to assume that the district court would invalidate the ordinance as it applies to the peddling of

all types of merchandise within 1,000 feet of the United Center. *See Madsen v. Women's Health Center,* 512 U.S. 753, 762 (1994) ("The parties seeking the injunction assert a violation of their rights; the court hearing the action is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public.").

B. The Seventh Circuit found that the 1,000-foot ban was not narrowly tailored for the additional reason that the ordinance is riddled with inconsistencies. The regulation bans peddling, but leaves untouched various other activities such as leafleting, newspaper sales, street performances, and charitable solicitations. The court correctly concluded that this haphazard approach to expressive activities presenting similar, or, in many cases, greater, risks of impeding pedestrian traffic undermined the city's asserted interests. 310 F.3d at 1039.

There is nothing "peculiar" about the fact "that the court of appeals found the ordinance unconstitutional because it did not prohibit enough speech." *See* Cert. Pet. 13. To the contrary, as this Court has explained: "While surprising at first glance, the notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles." *City of Ladue v. Gilleo,* 512 U.S. 43, 51 (1994). Exemptions from an otherwise legitimate regulation "may diminish the credibility of the government's rationale for restricting speech in the first place." *Id.* at 52; *accord Metromedia,* 453 U.S. at 520 (plurality opinion); *see, e.g., Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 424-26 (1993); *Carey,* 447 U.S. at 465.

That observation certainly holds true here. As the videotape shows, Mr. Weinberg sold his book out of a knapsack and consummated his transactions with a quick exchange of cash in a manner indistinguishable from that of the hockey-program vendors allowed outside the United Center. Street performers, whose activities are far more likely to gather a crowd than those of a bookseller, are not barred from

performing within 1,000 feet of the stadium, but are merely prohibited from blocking the passage of the public through a public area or obstructing access to private property. Chicago Muni. Code § 4-268-050(b) & (c).

Likewise, the ordinance does not bar charitable solicitation in the vicinity of the United Center, despite the fact that requests for donations invariably involve much greater interference with pedestrian traffic as the solicitor attempts to explain her cause to the prospective donor.[6] In fact, Chicago permits such soliciting *on the city streets themselves* at intersections where vehicles must come to a complete stop. Chicago Muni. Code § 10-8-160(5). As this Court has often recognized, charitable solicitation presents a greater risk of disruption in public fora than many other forms of speech. *See, e.g., United States v. Kokinda,* 497 U.S. 720, 733-34 (1990) (plurality opinion) ("Solicitation impedes the normal flow of traffic."). For this reason, the Court has upheld a ban on solicitation in airport terminals, *International Soc'y for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 683-84 (1992), while striking down a ban on the distribution and sale of literature in those same terminals. *See id.* at 690-93 (O'Connor, J., concurring); *id.* at 693-703, 708-09 (Kennedy, J., concurring); *id.* at 709-11 (Souter, J., concurring in part and dissenting in part); 505 U.S. 830 (1992) (per curiam) (adopting rationales of above opinions).

C. This is not to suggest, however, that this ordinance could be saved by banning *more* speech. *See Gilleo,* 512 U.S. at 53 ("If, however, the ordinance is also vulnerable because it prohibits too much speech, [the solution of repealing all

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[6] *See* 225 Ill. Comp. Stat. § 460/15(b)(5) (requiring any person engaged in public solicitation who describes the purposes for which funds are solicited to "fully and accurately" identify those purposes to the prospective donor); *id.* §§ 460/17 & 18 (requiring additional disclosures by professional solicitors).

exemptions] would not save it."). Here we come to the crux of the problem. The 1,000-foot ban on the sale of literature, the court of appeals rightly determined, "overcompensates for an alleged congestion problem on the sidewalks around the United Center." 310 F.3d at 1040. There is nothing in this conclusion that warrants further examination by this Court. It is settled law that an overinclusive limitation on speech in a public forum, one that "burden[s] substantially more speech than is necessary" to further its interests, is not narrowly tailored. *Ward v. Rock Against Racism,* 491 U.S. 781, 799 (1989); *see also Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.,* 502 U.S. 105, 122 n.* (1991) (an overinclusive law will not satisfy the *Ward* standards). Nor may government "regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward,* 491 U.S. at 798-99; *Frisby v. Schultz,* 487 U.S. 474, 485 (1988) ("A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil.").

Chicago contends that the court's conclusion that a 1,000-foot ban went too far was "perverse" because it prevents the city from targeting "the entire area in which expressive activity causes the secondary impact" and because the court provided "no guidance for how no-peddling zones can be drawn." Cert. Pet. 17. Both criticisms are wide of the mark. First, there is no evidence in the record whatsoever to support a ban on peddling of this scope. This is no minor quibble: all testimony regarding congestion, such as it was, focused on the area near the United Center's main entrance. This ordinance is so overbroad that it bars the sale of books every day of the year, and at all hours of the day, regardless of whether the stadium is even hosting an event. By the city's logic, it could ban all peddling throughout the entire city because the ban would encompass "the exact source of the evil it sought to remedy." Cert. Pet. 17 (quoting *Members of City Council v. Taxpayers*

for Vincent, 466 U.S. 789, 808 (1984)). This Court has not hesitated to evaluate the size of zones limiting protected speech on the public ways. *See, e.g., Schenck,* 519 U.S. at 377-79 (15-foot floating buffer zone burdened more speech than necessary); *Madsen,* 512 U.S. at 773-75 (300-foot zone around residences of clinic staff too broad; other restrictions could have accomplished the desired result). That a several-block ban on a significant amount of speech around the United Center may be more convenient for Chicago does not save it. "The First Amendment is often inconvenient. But that is beside the point. Inconvenience does not absolve the government of its obligation to tolerate speech." *Lee,* 505 U.S. at 701 (Kennedy, J., concurring).

Second, the panel opinion provides common-sense guidance for Chicago and other cities by suggesting "a ban of less distance, a ban on peddling on certain narrow walkways, or a ban on peddling on the sidewalks immediately surrounding the United Center." 310 F.3d at 1040. This is no different from the types of alternatives this Court has suggested in response to other overinclusive restrictions on speech.[7] As a majority of Justices noted in *Lee,* a total ban on the sale and distribution of literature in airport terminals could not be

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[7] Indeed, Chicago has adopted more carefully drawn means of targeting pedestrian congestion at other sports venues and in other contexts in which congestion could become an issue. *See, e.g.,* Chicago Muni. Code § 4-244-130 (permitting a licensed peddler to sell merchandise within 1,000 feet of Wrigley Field "provided that only a peddler selling from packs, baskets or similar containers may peddle merchandise on the public way. A peddler operating under this section shall be mobile, and shall not set up tables, stands or other structures, or obstruct or block the public way with his wares or merchandise"); *id.* § 4-268-050(b) & (c) (street performers "may not block the passage of the public through a public area" or "obstruct access to private property" without consent; police officer may disperse any portion of a crowd blocking public passage).

justified by the government's interest in alleviating congestion because such communication could have been relegated to a relatively uncrowded part of the airport terminals or the restrictions could have been tailored to particular choke points. *See* 505 U.S. at 692-93 (O'Connor, J., concurring); *accord id.* at 703 (Kennedy, J., concurring); *id.* at 712 n.* (Souter, J., concurring in part and dissenting in part); *see also Schneider v. New Jersey (Town of Irvington),* 308 U.S. 147, 162 (1939) (rejecting bans on distribution of pamphlets and pointing out that cities can punish littering directly).

That the Seventh Circuit pointed out that numerous less restrictive alternatives to a 1,000-foot ban exist does not mean that the court was requiring the city to adopt the least restrictive means of advancing its goals. *See Ward,* 491 U.S. at 798-800. Rather, the court's analysis simply appreciated that the existence of "numerous and obvious less-burdensome alternatives" to a restriction is a "relevant consideration in determining whether the 'fit' between ends and means is reasonable." *Discovery Network,* 507 U.S. at 417 n.13 (citation omitted); *see also Ayres v. City of Chicago,* 125 F.3d 1010, 1016 (7th Cir. 1997) (Posner, J.) ("[I]n a case such as this in which the challenged regulation seems likely to obliterate the plaintiff's message, the existence of less restrictive alternatives that would protect the valid regulatory interest is material to the constitutional issue."). As this Court exhorted in *Watchtower,* courts must look "to the amount of speech covered by the ordinance" and "whether there is an appropriate balance between the affected speech and the governmental interests that the ordinance purports to serve." 536 U.S. at 165. Here the Seventh Circuit acknowledged this obligation and quite rightly found on this record that this ordinance did not strike a proper balance. 310 F.3d at 1039 (citing *Watchtower*).

D. Finally, the court of appeals determined that the ordinance did not provide adequate alternative channels of communication because the 1,000-foot ban "effectively

eliminates any opportunity for Mr. Weinberg to sell his book to patrons of the United Center." *Id.* at 1040. What Chicago terms an "egregious" error, Cert. Pet. 17, involves only a straightforward application of the legal standard to these particular circumstances.

This Court's decision in *Heffron* is easily distinguishable. For starters, *Heffron* did not involve the public streets or sidewalks, but a state fair. Accordingly, this Court gave the state greater latitude in restricting organizations selling literature and soliciting donations to assigned locations at the fair because the fairgrounds were a limited public forum less conducive to the time-honored openness of the public ways. 452 U.S. at 651, 655. Second and more importantly, the rule sustained by the Court did not exclude ISKCON from the fairgrounds or deny it the ability to engage in speech "at some point within the forum." *Id.* at 655. Far from being "secreted away in some nonaccessible location," the assigned booths were "located within the area of the fairgrounds where visitors [were] expected, and indeed encouraged, to pass." *Id.* at 655 n.16; *see also Lee,* 505 U.S. at 684-85 (sidewalk area outside the terminals, where solicitation was permitted, is "frequented by an overwhelming percentage of airport users" and thus provided "complete" access to the general public).

By contrast, here, as noted in the Statement, *supra,* at 4, the vast majority of patrons first set foot in the vicinity of the United Center well inside the 1,000-foot perimeter and therefore would not encounter vendors who must remain outside that perimeter. Even a block away, Mr. Weinberg's sales of his book screeched to a virtual halt. The law is clear that a speaker is entitled to have access to his desired forum and audience. *See, e.g., Gilleo,* 512 U.S. at 57 (ban on residential signs invalid in part because the speaker "often intends to reach *neighbors,* an audience that could not be reached nearly as well by other means"); *Linmark Assocs. v. Township of Willingboro,* 431 U.S. 85, 93 (1977) (proscription

on "for sale" signs means that sellers "are less likely to reach persons not deliberately seeking sales information").

The city claims, however, that the court of appeals erred in failing to credit Mr. Weinberg's other alternatives, such as giving away his book for free, talking to patrons, and distributing leaflets or newspapers that either communicate his views or advertise his book for sale elsewhere. Cert. Pet. 19-20. Not only are these substitutes inadequate, but they underscore the weakness of Chicago's interests in prohibiting the sale of literature while permitting other means of communication equally as likely to lead to congestion, the evil the city claims it wishes to eliminate. First, Chicago cannot justify foreclosing such a uniquely valuable mode of communication as the sale of books by telling peddlers like Mr. Weinberg that they can always give their books away. The effect of such a rule would be to permit only the wealthiest persons and organizations to participate in the marketplace of ideas. *Lee,* 505 U.S. at 709 (Kennedy, J., concurring). "It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge." *Murdock v. Pennsylvania,* 319 U.S. 105, 111 (1943); *see also Ayres,* 125 F.3d at 1017 ("[T]he City's effort to distinguish between selling and giving away reduces the weight of the interests claimed to lie behind the ordinance."). Similarly, the fact that the statute invalidated in part in *Grace* allowed oral expression on the public sidewalks in front of the Supreme Court was insufficient to save it. 461 U.S. at 181-82 & n.10.

Mr. Weinberg's right to distribute leaflets either advertising the sale of his book elsewhere or expressing criticisms of Bill Wirtz likewise are ineffective substitutes for the sale of his book. To limit Mr. Weinberg to advertising his book near the United Center when it could only be purchased elsewhere is an unworkable solution. *See Lee,* 505 U.S. at 708 (Kennedy, J., concurring). In the court of appeals, Chicago actually suggested breaking up the book by chapter and then

selling it in newspaper fashion, which the ordinance apparently would permit. 310 F.3d at 1041 n.3. It is difficult to see how Mr. Weinberg's sale of these chapters would engender less "browsing" and pedestrian traffic, Cert. Pet. 14 n.5, than the sale of the book itself. The Seventh Circuit was right to reject the offer to require such "Herculean efforts" on Mr. Weinberg's part to complete a sale. 310 F.3d at 1042.

II. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

The city argues that the court of appeals' decision here creates a split in the circuits requiring this Court's resolution because other circuits have sustained other peddling bans. There is no conflict among the circuits, however, regarding the governing legal standard. Both the court of appeals in the case below and the decisions cited by Chicago apply the same legal standard: the time-place-and-manner test. *See, e.g., Friends of the Vietnam Veterans Memorial v. Kennedy,* 116 F.3d 495 (D.C. Cir. 1997); *One World One Family Now v. City & County of Honolulu,* 76 F.3d 1009 (9th Cir. 1996); *ISKCON of Potomac, Inc. v. Kennedy,* 61 F.3d 949 (D.C. Cir. 1995).

The validity of various bans on sales upheld in these cases turned on their facts: the strength of the government's interest, the scope of the ban on speech contemplated, the tailoring of the restriction to the problem at hand, the sufficiency of alternative means of expression, and the ability of the speaker to reach her intended audience—all of which involve different statutes, with different geographic reaches, different exceptions, and different justifications. A prohibition on the sale of t-shirts and other types of merchandise in the National Mall, which was promulgated to reduce commercialization and visual blight, for example, *see Friends,* 116 F.3d at 497, does not involve the same governmental interests or present the same issues as a prohibition on the sale of a book 1,000 feet

from an arena where there is little or no evidence showing that the sale of books in front of the arena, much less 1,000 feet from it, creates problems of crowd control. Indeed, the regulation of peddling on the National Mall explicitly *exempts* the sale of books, *ISKCON,* 61 F.3d at 952, evidently recognizing the government's reduced interest in limiting that form of speech.

Because the courts' determinations in these cases are fact-bound, it is unsurprising that the cases come out both ways. Just as there are decisions that have sustained various restrictions on peddling, so, too, are there decisions striking them down as invalid time, place, and manner regulations. *See, e.g., Ayres,* 125 F.3d 1010 (affirming preliminary injunction against peddling ban in designated city districts); *Bery v. City of New York,* 97 F.3d 689 (2d Cir. 1996) (ordering preliminary injunction against virtual ban on visual artists displaying their works for sale in public places); *Wexler v. City of New Orleans,* No. 03-990, 2003 WL 21403898 (E.D. La. June 16, 2003) (granting preliminary injunction against enforcement of ordinance prohibiting the sale of books on city streets). The same circuit will uphold one ban or buffer zone while striking down another. In *One World,* 76 F.3d 1009, for instance, the Ninth Circuit sustained a ban on the sale of merchandise in Waikiki streets as applied to the sale of t-shirts, while it invalidated a 75-yard security zone in *Bay Area Peace Navy v. United States,* 914 F.3d 1224 (9th Cir. 1990), and a peddling ban in Los Angeles. *See Perry v. Los Angeles Police Dep't,* 121 F.3d 1365 (9th Cir. 1997). Similarly, while the Seventh Circuit ruled in Mr. Weinberg's favor here, it held that an ordinance limiting panhandling on the public ways of Indianapolis was constitutional. *See, e.g., Gresham v. Peterson,* 225 F.3d 899 (7th Cir. 2000). This variation in outcomes is the natural outgrowth of the different circumstances at hand, not proof of the existence of inter- or intra-circuit splits that call for resolution by this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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